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86-1246
No. .....

In The
Supreme Court of the United States
October Term, 1986

OLD ORCHARD BRANDS, INC., and
R.V. SAUR AND SONS ORCHARDS, INC.,

Petitioner,

v.

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE, and 63RD JUDICIAL DISTRICT COURT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED FOR REVIEW

Do the mandatory assessment and participation provisions of the Michigan Agricultural Commodities Marketing Act, MCL 290.651, et seq.; MSA 12.94(21), et seq.; conflict with the free choice provisions of the Federal Agricultural Fair Practices Act (AFPA), 7 USC Section 2301, et seq., so as to make the state provisions invalid on the basis of preemption because they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?"

Does 7 USC 2305(d) preserve the validity of state statutory provisions which are in conflict with and "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"?

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OPINIONS OF COURTS BELOW

The Michigan Supreme Court did not issue an opinion. It simply denied leave to appeal the decision of the Michigan Court of Appeals. The Michigan Court of Appeals issued an opinion, and the Ingham County Circuit Court issued an opinion. Copies of these opinions are in the appendix.

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STATEMENT OF JURISDICTION

The Order of the Michigan Supreme Court denying leave to appeal was filed October 29, 1986. Jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3) and Rules of the Supreme Court of the United States, rule 17.1(C).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, cl.2. states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The federal "Agricultural Fair Practices Act of 1967" being Title 7, Sections 2301 et seq. a copy of this Act is found in the appendix.

The Michigan "Agricultural Commodities Marketing Act", MCL 290.651, et seq. a copy of this Act is found in the appendix.

———o———

STATEMENT OF THE CASE

Petitioner seeks certiorari from the decision of the Michigan Supreme Court denying leave to appeal from the decision of the Michigan Court of Appeals.

Ingham County Circuit Judge Jack Warren had ruled that the Michigan Apple Committee formed pursuant to the Michigan "Agricultural Commodities Marketing Act" constituted an "association of producers" under 7 USC 2302(c). He further ruled that their actions in forcing all apple producers to belong to and to pay assessments for the Apple Committee contravened one of the primary purposes of the federal "Agricultural Fair Practices Act of 1967" (hereinafter referred to as AFPA). That purpose was to preserve the free choice of producers to join associations or to remain independent.

Judge Warren ruled that the Michigan "Agricultural Commodities Marketing Act" is preempted to the extent that it allows producers associations such as the Apple Committee to fail to provide exemptions for non-participating producers. (see page 5 of opinion)

The Michigan Court of Appeals held that because of the fifth section of AFPA, 7 USC 2305(d) that the federal act had no preemptive effect because it was "existing

state law". *Old Orchard Brands, Inc. v. Department of Agriculture,* 152 Mich. App. 274.

The Michigan Supreme Court denied leave to appeal 426 Mich. 872 (1986).

ARGUMENT

7 USC 2305(d) was intended to promote the purposes of AFPA by preserving existing consistent state statutory provisions which might otherwise have been invalidated by an apparent intent to occupy the entire field of regulation. It was not intended to deprive the producer of the rights of freedom of choice provided in AFPA.

The United States Supreme Court unanimously struck down the mandatory provisions for participation and assessments of the Michigan Agricultural Marketing and Bargaining Act in the case of *Michigan Canners and Freezers Association v Agricultural Marketing and Bargaining Board,* — US —, 104 S Ct 2518; 81 L Ed 2d 399 (1984). The Michigan Agricultural Marketing and Bargaining Act, MCL 290.710(2) which was the subject of the *Michigan Canners and Freezers Association v Agricultural Marketing and Bargaining Board,* supra and the Michigan Agricultural Commodities Marketing Act, MCL 290.651(1) which is the subject of this action both provide that if more than 50% of the producers who produce more than 50% of the volume of the affected commodity vote to participate then all producers are deemed to have assented to the proposal and are assessed for the costs. All producers of the given commodity are re-

quired to participate and pay assessments. There is no free choice.

It would appear that the mandatory participation and assessment provisions of the act here involved deprive the producer of the right of free choice provided in AFPA just as much as the Michigan Act which was the subject of the *Michigan Canners* case.

The Michigan Court of Appeals' decision raises several questions which need answers which can only be given by this Court.

1. WHAT WAS THE CONGRESSIONAL PURPOSE OF 7 USC 2305(d)?

2. Was it to preserve consistent state legislation, and avoid total preemption of the entire field of regulation, or was it intended to preserve all existing state law even if such laws were in direct conflict with the main purposes of Congress and deprived producers of the right of free choice provided in the Federal Act?

3. Do producers in some states have the benefits of free choice which may be denied in other states depending solely upon the date of passage of the state legislation?

4. Would the United States Supreme Court decision in the *Michigan Canners and Freezers Association v Agricultural Marketing and Bargaining Board,* supra have been different had the Michigan Agricultural Marketing and Bargaining Act been enacted before 1967?

The interpretation of 7 USC 2305(d) by the Michigan Court of Appeals would appear to violate certain rules of statutory construction. Federal statutes are to be construed so as to give them a uniform application through-

out the nation. *Commercial Banking and T. Co. v Citizens Trust and G. Co.,* 153 Ky 566, 156 SW 160; *Cleveland, C.C. and St. L.R. Co. v. Backus,* 133 Ind 513, 33 NE 421, affd 154 US 439, 38 L Ed 1041, 14 S Ct 1122. It has been said that nothing but clear and unmistakable language will warrant a court in interpreting a federal act in such a way as to produce unequal operation of the statute.

The interpretation of statutory provisions requires looking at congressional intent, and the history and purposes of the statute. The United States Supreme Court has already ruled that one of the main purposes of AFPA 7 USC 2301 et seq. was to protect the free choice of the producer to remain independent. See *Michigan Canners and Freezers v Agricultural Bargaining Board,* supra.

The interpretation given to AFPA by the Michigan Court of Appeals would lead to very undesirable results. Laws of one state would be struck down while identical laws in another state would be valid depending on the date of passage.

Producers in one state would have free choice protected by federal law while producers in another would not.

The key phrase relied upon by the Court of Appeals is a part of 7 USC 2305, the enforcement provision, and is part of Subsection (d) which states as follows:

> (d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.
>
> The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction.

The legislative history of this section found in the US Code Congressional and Administrative News beginning on Page 1867 gives us an insight into the probable purpose of the critical phrase. This is found on Page 1876 in a letter from Orville L. Freeman, Secretary of Agriculture, to the Honorable Allen J. Ellender. The language in the bill that speaks about preserving existing State laws, etc., came as part of Mr. Freeman's recommendation which was as follows:

> Since some forms of conduct declared unlawful by section 4 of the bill would also violate existing statutes, we are suggesting the addition of a new section to make it clear that the bill is not intended to place exclusive jurisdiction in the Department of Agriculture.

The purpose of the language about existing State laws and State courts was to avoid a preemption which would invalidate State laws which were consistent with the purposes of the AFPA. This language was added to promote not destroy the policy of the AFPA which was to outlaw unfair trade practices, as defined by the Act, affecting producers of agricultral products. The purpose of this language was to permit State enforcement action in State courts against practices which Congress had determined should be unlawful.

The purposes of the language about State law and State courts found in 7 USC 2305(d) was to promote enforcement of the purposes of the AFPA. The interpretation given to 7 USC 2305(d) by the Court of Appeals would work against the purposes of the AFPA and create a very inconsistent result.

AFPA is clearly remedial in nature whose main purpose was to protect the free choice of the producer to join or *not* to join in producer associations. Such statutes are to be given a liberal construction in favor of those entitled to the benefits of the statute. See Statutes, Remedial Statutes, Section 278, 73 Am Jur 2d p. 443.

> "The construction should be consistent with, and promote, preserve, and effect, the object of the statute, so as effectually to meet the beneficial end in view, and not one which would defeat the manifest purpose of the statute."

The interpretation given to 7 USC 2305(d) by the Michigan Court of Appeals would appear to also violate the US Constitution Act VI, cl.2.

Where the Congressional intent is to declare and protect a right it would appear that any state statutory provision which "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" would be invalid. This type of preemption is constitutionally mandated.

———o———

CONCLUSION

The published opinion of the Michigan Court of Appeals brings into serious question the application of the Federal Agricultural Fair Practices Act (AFPA) and the extent of the protection of the right of free choice of agricultural producers so clearly set forth in the *Michigan Canners and Freezers Association v Agriculture Board,* supra. A ruling by this Court on the effect of 7

USC 2305(d) is a necessary guide for courts around the United States.

For the foregoing reasons, the Petitioner respectfully requests the issuance of a Writ of Certiorari to review the judgment and opinion of the Michigan Supreme Court and Michigan Court of Appeals.

Respectfully submitted,

H. JAMES STARR
Attorney for Petitioner

DATED: January 26, 1987

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AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of October in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

78923

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

OLD ORCHARD BRANDS, INC., and R.V. SAUR AND SONS ORCHARDS, INC.,

Plaintiffs-Appellants,

v

SC: 78923
COA: 84733
LC: 84-52178-AA

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE, AND 63rd JUDICIAL DISTRICT COURT

Defendants-Appellees.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the or-

iginal, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIM ONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of October in the year of our Lord one thousand nine hundred and eighty-six.

(SEAL)

/s/ Corbin R. Davis
Clerk.

OLD ORCHARD BRANDS, INC v. DEPARTMENT OF AGRICULTURE

Docket No. 84733. Submitted March 6, 1986, at Lansing. Decided June 2, 1986. Leave to appeal applied for.

Plaintiffs, Old Orchard Brands, Inc., and R. V. Saur and Sons Orchards, Inc., brought an action in the Ingham Circuit Court against the Department of Agriculture and the 63rd Judicial District Court to enjoin the collection of assessments made by the Department on behalf of the Michigan Apple Committee. They also sought a declaratory judgment that the act requiring the payment of the assessments was either not applicable to plaintiffs or was unlawful. The Michigan Apple Committee was established under the Agricultural Commodities Marketing Act to administer a marketing program the Michigan Apple Growers initiated and approved by referendum vote. Prior to plaintiffs' filing suit, the department brought an action against plaintiffs to enforce collection of the assessments in the 63rd Judicial District Court. The Circuit court, Jack W. Warren, J., granted plaintiffs a declaratory judgment, holding that the Federal Agricultural Fair Practices Act preempted state regulation. The Department of Agriculture appealed. *Held:*

The Agricultural Commodities Marketing Act was not preempted by the Federal Agricultural Fair Practices Act.

Reversed.

AGRICULTURE—AGRICULTURAL COMMODITIES MARKETING ACT—AGRICULTURAL FAIR PRACTICES ACT.

The Agricultural Commodities Marketing Act was not preempted by the Federal Agricultural Fair Practices Act (7 USC 2301 *et seq.*; MCL 290.651 *et seq.*; MSA 12.94[21] *et seq.*).

H. James Starr, for plaintiffs.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *Charles D. Hackney* and *David W. Silver,* Assistant Attorneys General, for defendant.

Amici Curiae:

Foster, Swift, Collins & Coey, P.C. (by *James A. White* and *Michael J. Schmedlen*), for Michigan Farm Bureau and Michigan Milk Producers Association.

Roccy M. De Francesco (by *John M. Cannon, Susan W. Wanat* and *Ann Plunkett Sheldon,* of counsel), for Mid-Michigan Legal Foundation.

Before: SHEPHERD, P.J., and M. J. KELLY and R. L. TAHVONEN,* JJ.

SHEPHERD, P.J. Defendant Michigan Department of Agriculture appeals as of right from an order of declaratory judgment entered on February 25, 1985, by the Ingham Circuit Court. The circuit court held that the federal Agricultural Fair Practices Act, 7 USC 2301 *et seq.,* (hereafter the AFPA) preempts Michigan's Agricultural Commodities Marketing Act, MCL 290.651 *et seq.;* MSA 12.94(21) *et seq.* We reverse and hold that the federal act does not preempt the Agriculture Commodities Marketing Act.

REFERENCES

Am Jur 2d, Agriculture §§ 58-64.
See the annotations in the ALR3d/4th Quick Index under Agriculture.

* Circuit judge, sitting on the Court of Appeals by assignment.

The Agricultural Commodities Marketing Act authorizes Michigan producers of agricultural commodities to form marketing programs to promote their products. Such marketing programs may establish advertising and market-development programs, conduct research, disseminate market information, set quality standards, inspect and grade commodities, institute surplus controls, and provide for payment to producers according to established grades. Finally, under the terms of the statute, a marketing program, if it chooses, may exempt nonparticipating producers. MCL 290.653; MSA 12.94(23).

In 1968, Michigan apple growers initiated and approved by referendum vote a marketing program pursuant to the Agricultural Commodities Marketing Act. The Michigan Apple Committee was formed to administer the program. The committee provides producers with market information and conducts advertising, promotion, publicity, and research programs in accordance with MCL 290.653; MSA 12.94(23). The program is funded by assessments levied against each producer. The apple committee has made no provision to exempt producers who do not wish to participate. However, MCL 290.663; MSA 12.94(33) does provide a procedure for producers to petition the director of the Department of Agriculture to call a vote to terminate the program.

R. V. Saur and Sons Orchards, Inc., an apple processor, and Old Orchard Brands, Inc., an apple grower, refused to pay assessments levied for the 1982-1983 growing season, ending June 30, 1983.[1] In an unrelated proceeding,

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[1]Under the Agricultural Commodities Marketing Act, processors may be required to collect and remit producer assessments. MCL 290.655; MSA 12.94(25).

pursuant to MCL 290.669; MSA 12.94(39), the director of the Department of Agriculture instituted actions against the above parties in the district court, seeking to collect the unpaid assessments plus interest, penalties, and costs. Thereafter, on May 18, 1984, R. V. Saur and Sons Orchards, Inc., and Old Orchards Brands, Inc., (hereinafter plaintiffs) filed the instant action in the circuit court against the Department of Agriculture and the 63rd Judicial District, seeking to enjoin the enforcement action in the district court and a declaratory judgment that the Agricultural Commodities Marketing Act was not applicable to apples. On July 11, 1984, plaintiffs amended their complaint and alleged that the federal Agricultural Fair Practices Act prohibited mandatory participation in the Michigan Apple Committee program and that the federal act preempted Michigan's Agricultural Commodities Marketing Act. As authority, plaintiffs relied principally upon a June 11, 1984, decision by the United States Supreme Court, *Michigan Canners & Freezers Ass'n, Inc v Agricultural Marketing & Bargaining Bd*, 467 US 461; 104 S Ct 2518; 81 L Ed 2d 399 (1984). Both parties moved for summary judgment. The circuit court agreed with plaintiffs' position and ruled that the AFPA preempted the Agricultural Commodities Marketing Act "to the extent that it allows producers' associations such as the apple committee to fail to provide exemption for nonparticipating producers."

The sole issue before this Court on appeal is whether the federal AFPA preempts Michigan's Agricultural Commodities Marketing Act. The AFPA is a federal agricultural statute that was the object of interpretation by the United States Supreme Court in *Michigan Canners & Freezers Ass'n v Agricultural Marketing & Bargaining Bd*,

supra. In that decision, the Supreme Court concluded that the AFPA preempted Michigan's Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.;* MSA 12.94(101) *et seq.* The latter act established a state administered system by which a majority of the producers of a particular commodity could organize a producers' association and then certify that association as the exclusive bargaining agent for all the producers of that particular commodity in the state. Pursuant to that authority, the Michigan Agricultural Cooperative Marketing Association, Inc., (hereafter MACMA), was formed and accredited as the sole sales and bargaining representative for all asparagus producers in the state. Thus, a producer who objected to a contract negotiated by MACMA would nevertheless be bound by the terms (including price), be precluded from marketing his produce himself, and be forced to pay fees to the association for the services rendered. The Supreme Court held that the Michigan act was in clear violation of 7 USC 2303(c) because it had the effect of coercing a producer to "enter into [or] maintain . . . a marketing contract with an association of producers or a contract with a handler." 467 US 478. Unlike the Agricultural Marketing and Bargaining Act, the Agriculture Commodities Marketing Act, which is the subject of this appeal, does not empower producers' association to act as a sales and bargaining agent to producers.

The United States Supreme Court in *Michigan Canners* explained the three ways federal law may preempt state law:

> Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it in-

> tends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citations omitted. 467 US 469.]

The Supreme Court concluded that the AFPA neither contains preemptive language nor reflects a congressional intent to occupy the entire field.[2] *Id.* In fact, the AFPA contains express language eliminating its preemptive effect on existing state law. The fifth section of the AFPA, 7 USC 2305(d), states in part:

> *The provisions of this chapter shall not be construed to change or modify existing State law* nor to deprive the proper State courts of jurisdiction. [Emphasis added.]

The Agricultural Commodities Marketing Act was enacted by 1965 PA 232, effective March 31, 1966. The AFPA was enacted by Pub L 90-288 on April 16, 1968. Since the Agricultural Commodities Marketing Act was "existing State law," the AFPA, by its own terms has no preemptive effect. The trial court's opinion does not mention § 2305(d) and thus fails to explain how its clear import may be ignored. Plaintiffs without elaboration argue

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[2]The Supreme Court followed the third alternative in holding that the Agricultural Marketing and Bargaining Act was in actual conflict with the AFPA.

that the same argument was made and rejected in *Michigan Canners*. However, § 2305(d) was not a bar to the Supreme Court's decision in *Michigan Canners,* because, as the Supreme Court noted, the Michigan act under scrutiny there, unlike the subject act of this appeal, was enacted *after* the AFPA was enacted.

We conclude that the Agricultural Commodities Marketing Act was "existing State law" and, accordingly, the AFPA, by its clear language, has no preemptive effect. We reverse the contrary declaratory judgment of the circuit court.

Reversed.

DZIERWA v MICHIGAN OIL COMPANY

Docket No. 86190. Submitted March 11, 1986, at Lansing. Decided June 2, 1986.

Plaintiff, David J. Dzierwa, brought an action in the Jackson Circuit Court against defendants, Michigan Oil Company (MOC) and John J. Smith, the president and a director of MOC, following the termination of plaintiff's employment with MOC. Plaintiff's complaint specified four claims: Count 1, discharge by MOC without good or just cause; Count II, unjustifiable inducement by Smith, causing MOC to breach its agreement with plaintiff; Count III, unjustifiable interference by Smith with the agreement between plaintiff and MOC; and Count IV, "publication by Smith of objectionable material which tended to place plaintiff in a false light, causing plaintiff embarrassment, humiliation and emotional stress. Defendants filed a motion for summary judgment and, before the motion was heard, the parties agreed that plaintiff would file a first amended complaint. Although defendants' motion was prepared in response to plain-

tiff's original complaint, the trial court, Russell E. Noble, J., granted summary disposition as to all counts of plaintiff's first amended complaint. Plaintiff appeals from the opinion and order granting summary disposition. *Held:*

1. The trial court properly ruled, after reviewing plaintiff's amended complaint and all available depositions and affidavits, that plaintiff's wrongful discharge claim (Count I) was unsupportable since his employment was terminable at will.

2. Summary disposition on Counts II and III was proper. To maintain a cause of action for tortious inference with a contract, a plaintiff must establish a breach of contract caused by the defendant and that the defendant was a third party to the

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REFERENCES

Am Jur 2d, Labor and Labor Relations §§ 1070, 1071.

Am Jur 2d, Pleading §§ 71 *et seq.*

Am Jur 2d, Summary Judgment §§ 12 *et seq.*

Validity and enforceability of provision that employer shall be liable for stipulated damages on breach of employment contract. 40 ALR4th 285.

See also the annotations in the ALR3rd/4th Quick Index under Judgments.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

Docket No. 84-52178-AA

OLD ORCHARD BRANDS, INC., and
R.V. SAUR AND SONS ORCHARDS, INC.,

Plaintiffs,

v

STATE OF MICHIGAN, DEPARTMENT OF
AGRICULTURE, and 63rd JUDICIAL
DISTRICT COURT,

Defendants.

OPINION

The Plaintiffs brought this civil action seeking an injunction against the collection of unpaid apple assessments and a declaratory judgment that the act requiring the payment of assessments is either not applicable to the Plaintiffs or is unlawful. The request for injunctive relief was previously denied by this Court. The Plaintiffs now move for summary judgment as to the declaratory judgment claim pursuant to GCR 1963, 117.2(3). Defendant Michigan Department of Agriculture also requests summary judgment.

The facts of this case are not in dispute. The Michigan Apple Committee was established by a referendum vote pursuant to the agricultural commodities marketing act, MCL 290.651 *et seq;* MSA 12.94(21) *et seq.* Under the act, an organization established by referendum may provide an exemption for non-participating producers.

The Apple Committee does not provide such an exemption, and therefore *all* affected producers are required to pay assessment fees to support the Committee's activities. The Committee is engaged in research, advertising, promotion, and publicity programs to create new markets for apples and apple products. The Committee does not sell or negotiate sales of apples for the apple producers. Neither the act nor the Committee requires individual producers to own stock or to vote on any Committee activities, but the producers are, in effect, required to accept the Committee's representation in an overall marketing and promotional campaign and to support all Committee activities through fee assessments.

Plaintiff Old Orchard Brands is engaged in the business of selling apples and apple products. Plaintiff R.V. Sauer and Sons Orchards is engaged in the business of cold storage and the packing of apples. The Plaintiffs have refused to pay the apple assessments and seek a declaratory judgment that they cannot be forced to pay the assessments based on the following arguments:

1) The Baldwin apple act, 1939 PA 87; MCL 290.51 (Repealed, 1984 PA 161, effective June 27, 1984), which allowed exemptions for non-participating producers, remained in effect and governed apple producers during the time period in question,

2) The agricultural commodities marketing act violates Article 4, § 1 of the Michigan Constitution of 1963,

3) The agricultural commodities marketing act violates Article 4, § 25 of the Michigan Constitution of 1963, and

4) The provision of the agricultural commodities marketing act allowing the Apple Committee to not provide exemptions for non-participating producers is preempted by certain provisions of the agricultural fair practices act, 7 USC 2301 *et seq* (the AFPA).

The first argument is not persuasive, Section 20 of the commodities marketing act, MCL 290.670; MSA 12.94 (40), expressly provides for the suspension of marketing programs operated under specific statutes where a program is in effect under the act. Here the formation of the Committee suspended the operation of the Baldwin act.

Plaintiffs next argue that the establishment of the Committee constitutes an improper delegation of legislative power under Article 4, § 1 of the Michigan Constitution. This argument was previously addressed and rejected in *Dukesherer Farms, Inc v Dept of Agriculture*, 405 Mich 1; 273 NW2d 877 (1979). Nothing that has been presented to this Court compels a different conclusion in this case.

Plaintiffs next argue that the provision suspending operation of the Baldwin act violates Article 4, § 25 of the Michigan Constitution by failing to reenact and republish the altered or amended provisions of the Baldwin act. However, the Baldwin act was not actually altered or amended in any way. The commodities marketing act merely provided an alternative method of organization for agricultural producers. If this alternative had not been chosen by a referendum vote, the Baldwin act would have remained in effect. This later creation of an alternative and separate form of organization did not constitute an alteration of or an amendment to the earlier statute.

Finally, the Plaintiffs argue that the provision allowing the Committee to require all producers to pay fee assessments has been pre-empted by the AFPA, 7 USA 2301 *et seq.* The Plaintiffs cite as controlling the case of *Michigan Canners and Freezers Association v Agricultural Marketing and Bargaining Board,* — US —; 104 S Ct 2518; 81 LEd2d 399 (1984).

In *Michigan Canners and Freezers,* a producers association was formed to be the sales and bargaining representative for asparagus producers in Michigan. The association was established under the agricultural marketing and bargaining act, MCL 290.701 *et seq;* MSA 12.94 (101) *et seq.*[1] The association of asparagus producers did not allow for exemptions for non-participating producers, and virtually all asparagus producers were thus required to pay service fees and to adhere to association-negotiated marketing contracts. The United States Supreme Court held that the Michigan statute's allowance of such a requirement was pre-empted by § 2303 of the AFPA, 7 USC 2303, which forbids handlers (a term that includes associations of producers for purposes of the AFPA) to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers" or to coerce producers to enter into or to refrain from entering into marketing contracts.

The State concedes that the *Michigan Canners and Freezers* decision would apply if the Apple Committee was a "true" producers' association, that is, a group of

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[1]The requirements for establishing an association under this act are similar to the requirements under the commodities marketing act.

producers organized for the purpose of selling their agricultural products. The State instead argues that the Apple Committee is not an association of producers under the AFPA. The State points out that the Apple Committee was formed under a different statute, that its activities are limited to advertising, promotion, market development, research and the like, and that it does not enter into sales agreements on behalf of producers or in any way limit individual producers in the sale of their products.

However, a careful reading of the Supreme Court's opinion indicates that the holding was not as limited as the State contends. The Court held that Michigan producers' associations could not coerce producers to join the associations or to effectively force them to join such associations by requiring them to be bound by sales agreements and to pay service fees to support the association. The underlying reason for the Supreme Court's decision and the theme of the entire opinion was the intent of Congress to preserve the free choice of producers to join associations formed for their mutual benefit or to remain independent. Nothing in the opinion or in the discussion of the intent of Congress suggests that that theme narrowly applies only to associations empowered to enter into buy and sell agreements. In fact, the Supreme Court's opinion placed nearly as much emphasis on the mandatory nature of the service fees as on the association's ability to bind the producers to sales agreements. In light of the opinion and the emphasis placed on voluntariness by both Congress and the Supreme Court, the State's decision to narrowly interpret the statutory definition of what constitutes an association of producers seems unlikely.

Section 2302 of the AFPA, 7 USC 2302, defines an association of producers as an association of agricultural producers "engaged in marketing, bargaining, shipping, or processing as defined in [12 USC 1141j(a)] . . ." 12 USC 1141j(a) includes in the definition " . . . processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, . . . Provided, however, that such associations are operated for the mutual benefit of the members thereof as such producers or purchasers . . ." There can be little dispute that the Apple Committee was formed (or caused to be formed) by producers of an agricultural product, or that it was formed for the purpose of providing benefits to those producers.[2] The issue here is whether the Apple Committee is engaged in one or more of the listed activities on behalf of those producers.

Both definitions include organizations engaged in marketing. It is this Court's opinion that the term "marketing", in the context of the broad emphasis on voluntariness discussed earlier, cannot be so narrowly construed as to include in the definition of producers' associations only those organizations empowered to bind its members to sales agreements. In this context the term "marketing" must also include activities commonly associated with the overall marketing of a product such as research,

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[2]Although the apple producers are not necessarily Committee members themselves, the Committee represents apple producers in much the same way that the marketing association in *Michigan Canners and Freezers* represented asparagus producers. The asparagus producers association merely conducted different activities. The key is whether all producers of a commodity are effectively coerced into accepting the representation and supporting the representative.

advertising, promotion, and the implementation of publicity programs.[3]

As the Apple Committee was formed by a vote of agricultural producers of apples for the mutual benefit of those producers, and as it is engaged in the activities listed in the AFPA, it is an association of producers for purposes of the AFPA. Therefore, the agricultural commodities marketing act is pre-empted to the extent that it allows producers' associations such as the Apple Committee to fail to provide exemptions for non-participating producers.

In conclusion, the Plaintiffs' three claims based on the Baldwin act and the Michigan Constitution are without merit. However, the Plaintiffs are entitled to a declaratory judgment based solely on the pre-emption of the commodities marketing act by the AFPA. The Plaintiffs' motion for summary judgment should be granted on that basis.

An appropriate order may enter.

Dated: FEBRUARY 4, 1985.

/s/ Jack W. Warren, Circuit Judge

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[3]The Court notes from the title of the act in question that the Michigan legislature also apparently considers the term "marketing" to include these activities.

AGRICULTURAL COMMODITIES MARKETING ACT

Michigan Administrative Code

For Rules and Regulations, see Rule 285.301.1 et seq., Michigan Administrative Code.

Library References

Agriculture 2 et seq.

C.J.S. Agriculture §§ 8 et seq., 51, 67, 96, 100, 134, 175,

P.A.1965, No. 232, Eff. March 31, 1966

AN ACT relating to the marketing of agricultural commodities; to provide for marketing programs, agreements, referendums by producers, assessments on producers, and commodity committees; and to prescribe the functions of the department of agriculture relative thereto including powers of enforcement of this act; and to prescribe penalties. Amended by P.A.1974, No. 324, § 1, Imd. Eff. Dec. 15.

The People of the State of Michigan enact:

290.651. Short title

Sec. 1. This act shall be known and may be cited as the "agricultural commodities marketing act".

290.652. Definitions

Sec. 2. As used in this act:

(a) "Agricultural commodity" means all agricultural, horticultural, floricultural or vineyard products, livestock or livestock products, poultry or poultry products, Christmas trees, bees, maple syrup and honey, produced in this state, either in their natural state or as processed

by the producer thereof. The kinds, types, and subtypes of products to be classed together as an agricultural commodity for the purposes of this act shall be determined on the basis of common usage and practice.

(b) "Producer" means a person engaged in the business of producing, or causing to be produced for any market, an agricultural commodity in quantity beyond that person's own family use, and having a value at first point of sale of more than $800.00 for the agricultural commodity in any 1 growing and marketing season within the last 3 years.

(c) "Handler" means a person engaged in the operation of packing, grading, selling, offering for sale or marketing a marketable agricultural commodity in commercial quantities as defined in a marketing program, who as owner, agent, or otherwise, ships or causes an agricultural commodity to be shipped.

(d) "Processor" means a person engaged in canning, freezing, dehydrating, fermenting, distilling, extracting, preserving, grinding, crushing, or otherwise preserving or changing the form of an agricultural commodity for the purpose of marketing it.

(e) "Distributor" means a person engaged in selling, offering for sale, marketing, or distributing an agricultural commodity which he has purchased or acquired from a producer or which that person is marketing on behalf of a producer, whether as owner, agent, employee, broker, or otherwise, but shall not include a retailer, except a retailer who purchases or acquires from, or handles on behalf of a producer, an agricultural commodity not previously sub-

jected to regulations by the marketing program covering the commodity.

(f) "Department" means the state department of agriculture.

(g) "Director" means the director of the department of agriculture.

(h) "Marketing agreement" means an agreement entered into, with the director, by producers, distributors, processors, or handlers pursuant to this act and binding only on those signing.

(i) "Marketing program" means a program established by order of the director pursuant to this act, prescribing rules and regulations governing the marketing for processing, distributing, selling, or handling an agricultural commodity produced in this state during a specified period and which the director determines would be in the public interest.

(j) "Committee" means the commodity committee or advisory board established under a marketing program.

290.653. Marketing agreements; provisions allowed

Sec. 3. Any marketing agreement or program issued pursuant to this act may contain one or more of the following:

(a) Provisions for establishing advertising and promotional programs.

(b) Provisions for establishing market development programs.

(c) Provisions for establishing and supporting supplemental research programs designed to improve the mar-

ket acceptability of the specific commodity and contribute to the effectiveness of the program.

(d) Provisions for development and dissemination of market information.

(e) Provision for contracting with organizations, agencies or individuals for carrying out any of the above activities.

(f) Provisions for:

(1) Establishing standards for quality, condition or size for agricultural commodities sold as fresh products for resale or processing and standards for pack and/or container for commodities sold for use as fresh products.

(2) Inspection and grading of the fresh commodity in accordance with the grading standards so established.

(g) Provision for determining the existence and extent of any surplus in any marketing period, for any commodity or product, or of any grade, size, or quality thereof, and providing for handling and equitably sharing the cost of such surplus handling among the producers of the commodity. Before provisions under this paragraph are included in any marketing program, particular attention shall be given to determining that Michigan producers affected by the provisions produce a sufficient proportion of the product covered by the provisions for the program to be effective in the particular market toward which the provisions would be applicable.

(h) Provision for payment for all usable products purchased from producers according to established grades.

(i) Provision for exemption of nonparticipating producers.

290.654. Inspection; approved inspectors

Sec. 4. For the purpose of this act, all inspection and grading shall be performed by or under the supervision of competently trained inspectors approved by the director or by inspectors supplied under cooperative agreement between the department and the United States department of agriculture.

290.655. Assessments; collection, maximum

Sec. 5. (a) Assessments shall be collected from each producer of a marketable agricultural commodity produced in this state and directly affected by a marketing program issued for the commodity to defray all program and administrative costs except as provided under section 3(i).[1]

(b) Each program shall specify the maximum assessment to be collected to cover program and administrative costs.

(c) For convenience the processors, distributors, or handlers of the commodity may be required to collect and remit producer assessments at no cost to the marketing program. Processors, distributors, or handlers paying the assessments for a producer may deduct the amount from any money which they owe to the producers.

(d) Each program shall specify the date when the assessment, whether collected by the producers, processors, distributors, or handlers of the commodity, is due in the account of the program on that production. Producers,

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[1]Section 290.653(i).

processors, distributors, or handlers of the affected commodity shall be given reasonable notice of the due date.

290.656. Marketing program; temporary suspension, duration

Sec. 6. The operation of a marketing program, or any part thereof, may be temporarily suspended by the director upon recommendation by the committee for a period of not longer than 1 growing and marketing season if the program or part is deemed undesirable during such season.

290.657. Commodity committee; membership, appointment, expenses, duties

Sec. 7. (1) A marketing program shall provide for the establishment of a commodity committee to consist of an odd number of members which shall be not less than 5 nor more than 15.

(2) The members of the committee shall be appointed by the governor with the advice and consent of the senate from nominations received from the producers and handlers or processors of the commodity for which the marketing program is established. Nominating procedures, qualifications, representation, term of office, and size of the committee shall be prescribed in the marketing program for which the committee is appointed. Each committee shall be composed of producers and handlers or processors who are directly affected by the marketing program in the proportion of representation as prescribed by the program.

(3) A member of a committee shall be entitled to reimbursement for actual expenses, and a per diem payment not to exceed $75.00 per day while attending meetings of the committee or while engaged in the performance of official responsibilities delegated by the committee.

(4) The duties and responsibilities of a committee shall be prescribed in the order establishing the program and to the extent applicable shall include the following duties and responsibilities:

(a) Developing administrative procedures relating to the marketing program.

(b) Recommending amendments to the marketing program as are considered advisable.

(c) Preparing the estimated budget required for the proper operation of the marketing program.

(d) Developing methods for assessing producers and methods for collecting the necessary funds.

(e) Collecting and assembling information and data necessary for proper administration of the program.

(f) Performing other duties necessary for the operation of the marketing program as agreed upon with the director.

(5) The business which a committee may perform shall be conducted at a public meeting of the committee held in compliance with Act. No. 267 of the Public Acts of 1976, as amended, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976 as amended.

(6) The writing prepared, owned, used in possession of, or retained by a committee in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, as amended, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

290.658. Deposit of moneys collected; expenditures

Sec. 8. (a) Any moneys collected pursuant to this act shall not be state funds and shall be deposited in a bank or other depository in this state, allocated to the marketing program under which they are collected, and disbursed only for the necessary expenses incurred with respect to each such separate marketing program, in accordance with the rules established under the program.

(b) All expenditures shall be audited by the state auditor general, or by a certified public accountant at least annually, and within 30 days after completion thereof the state auditor general or certified public accountant shall give copies thereof to the members of the committee and the director. An activity and financial report shall be published annually and made available to interested parties.

290.659. Refunds

Sec. 9. Any moneys remaining from the assessments collected under a marketing program may be refunded at the close of any marketing season upon a pro rata basis to all persons from whom assessments were collected, or whenever the committee finds that the moneys may be necessary to defray the cost of operating this marketing program in succeeding marketing seasons, all or any portion of the moneys may be carried over into succeeding seasons. Upon termination of any marketing program, all moneys remaining and not required to defray the expenses of operating the marketing program shall be refunded on a pro rata basis to persons from whom assessments were collected. If the committee finds that the amounts so refundable are so small as to make impracticable the computation and refunding of the refunds, the moneys may be used to defray the expenses incurred by the department in the formula-

tion, adoption, administration or enforcement of any subsequent marketing program for the commodity or for agricultural research for that commodity.

290.660. Petition for program or amendment; notice, hearing, decision by director

Sec. 10. (a) Whenever the director has received a petition signed by 25%, or 200, of the producers of an agricultural commodity, whichever is less, for the adoption of a marketing program or amendments to an existing marketing program, he shall give notice of a public hearing on the proposed marketing program it is or the proposed amendments to an existing marketing program. After receiving a petition for the establishment of a marketing program, the director may appoint a temporary producer committee to develop the proposed program to be considered at the public hearing.

(b) The director may require all handlers or processors of the agricultural commodity as individuals or through their trade associations to file with him within 30 days a report, properly certified, showing the correct names and addresses of all producers of the agricultural commodity from whom such handler or processor received such agricultural commodity in the marketing season next preceding the filing of such report.

The information contained in the individual reports of handlers or processors filed with the director pursuant to provisions of this section shall not be made public by the director, nor available to anyone for private use.

(c) The director shall issue a decision within 45 days after the close of the hearing based upon his findings, and deliver, by mail or otherwise, copies of the findings and

recommendation, approving or disapproving of the proposed program to all parties of record appearing at the hearing and any other interested parties. The recommendation shall contain the text in full of any proposed program or amendment of an existing program. The recommendation shall be substantially within the purview of the notice of hearings and shall be supported by evidence taken at the hearing or by documents of which the director is authorized to take official notice.

290.661. Referendum, conditions for assent

Sec. 11. (1) After recommending the adoption or amendment of a marketing program, the director shall determine by a referendum whether the affected producers assent to the proposed action. If provisions prescribed in section 3(g)[1] are part of the proposed program, the director shall also determine by a referendum if processors assent to the proposed action. The director shall conduct the referendum within 45 days after the issuance of the recommendation. The affected producers shall be considered to have assented to the proposal if more than 50% by number of those voting representing more than 50% of the volume of the affected commodity produced by those voting assent to the proposal. The affected processors, if provisions prescribed in section 3(g) are in the program, shall be considered to have assented to the proposal if more than 50% by number of those voting representing more than 50% of the volume of the affected commodity processed by those voting assent to the proposal.

(2) A program involving provisions prescribed in section 3(g) shall not be instituted without assent of both the affected producers and the affected processors.

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[1]Section 290.653(g).

290.662. Director to establish procedures for determination of volume

Sec. 12. The director shall establish procedures for determination of volume for the conduct of referendums and other necessary procedures. For the purpose of referendums under this act, a producer is entitled to 1 vote representing a single firm, individual proprietorship, corporation, company, association, partnership, husband-wife or family ownership.

290.663. Termination of program; petition, hearing, recommendation, referendum

Sec. 13 (a) Upon written petition duly signed by 25%, or 200, of the producers affected by the program, whichever is less, the director shall, within 30 days, give 10 days' notice and hold a hearing on termination of a program.

(b) Within 30 days after the close of the hearings, the director, after consulting with the committee, shall issue a recommendation, give public notice, and notify all producers of record, all parties appearing at the hearing and any other interested parties.

(c) The director, upon recommending termination of a marketing program, shall, within 30 days, conduct a referendum to determine whether the affected producers assent to the proposed action. The affected producers shall be deemed to have assented to the termination of the program if 51% or more by number of those voting, represents 51% or more of the volume of those voting, vote in favor of its termination.

290.644. Program approved by referendum; duties of director

Sec. 14. If a program has been approved in referendum, the director shall:

(a) Insure that the program is self-supporting.

(b) Supervise all committee activities to assure program operations are in accord with the rules established under the program as approved by the referendum.

(c) Coordinate administrative activities between the committee and the department.

(d) Confer and cooperate with the legally constituted authorities of other states and the United States.

290.665. Proposed programs; necessary provisions

Sec. 15. Any proposed marketing program adopted pursuant to this act shall include definition of terms, purpose of the program, the maximum rate of assessment, method of collection, nominating procedure, qualifications, representation and size of the committee, and other necessary provisions.

290.666. Deposit of funds for expenses, reimbursement

Sec. 16. Prior to the adoption of a marketing program, the director may require the applicants therefor to deposit with him such funds as he deems necessary to defray the expenses of preparing and establishing the marketing program. The funds shall be received, deposited and disbursed by the director in the same manner as other fees received by him under this act. The applicants shall be reimbursed in the amount of the deposit from fees received under such program, if established.

290.667. Marketing agreements with producers, handlers and others; effect

Sec. 17. The director may enter into marketing agreements with producers, handlers or other parties where such agreements will tend to supplement or aid in the accomplishment of the objectives of a marketing program.

The execution of a marketing agreement shall not affect the adoption, administration or enforcement of any marketing program under this act. The director may hold a concurrent hearing upon a proposed marketing agreement and a proposed marketing program in the manner provided in this act, giving due notice and opportunity for hearing for a marketing agreement. When a marketing agreement is proposed for any commodity, the director shall call a public hearing, and the decision to enter into or not enter into a marketing agreement shall be subject to the same requirements for justification on the basis of factual evidence introduced at the hearing. A marketing agreement, if recommended by the director, shall become effective when signed by the director and the other parties to the agreement.

290.668. Rules and regulations; director to promulgate

Sec. 18. The director may make and promulgate such rules and regulations as may be necessary to effectuate the provisions and intent of this act, in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948.

290.669. Actions by director

Sec. 19. (1) Except as provided in subsections (2) and (3), the director may institute an action necessary to enforce compliance with this act, a rule promulgated under this act, or a marketing agreement or program, adopted under this act and committed to his or her administration. In addition to any other remedy provided by law, the director may apply for relief by injunction to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. The application may be made to the circuit court in any county.

(2) A violation of section 7(5) shall be enforced in the manner provided for enforcement of a violation of Act No. 267 of the Public Acts of 1976, as amended.

(3) A violation of section 7(6) shall be enforced in the manner provided for enforcement of a violation of Act No. 442 of the Public Acts of 1976, as amended.

Amended by P.A.1980, No. 196, § 1, Imd. Eff. July 8.

290.670. Suspension of statute where marketing program approved; exception

Sec. 20. (a) If a marketing program is approved for a commodity for which there is a state commission or council operating pursuant to a statute, such statute is suspended during the period of operation of the marketing program under this act, except that the appointed members of an existing commission or council shall be members of the commodity committee for the duration of the terms for which they were appointed, and no fees or assessments shall be collected under such act while it is suspended.

(b) If the producers of an agricultural commodity for which there is a state commission or council pursuant to a statute, vote for discontinuance of a marketing program, then the provisions of such commission or council shall be reinstated, and the appointed members on the commodity committee shall be members of the commission or council for the duration of the terms for which they were appointed on the committee.

(c) Voluntary commodity organizations may be assigned duties which are necessary for the effective operation of a marketing program and allowed expenses to cover such duties. Organizations to be assigned such responsibilities shall be named and their duties defined in the program.

290.671. Referendum; required each fifth year

Sec. 21. All marketing programs under this act shall be resubmitted to a referndum of the producers during each fifth year of operation.

290.672. Interest on unpaid assessment

Sec. 22. If the assessment is not paid by the date specified by a program as permitted under section 5(d),[1] the unpaid assessment shall be subject to an interest charge of 1% per month.

290.673. Violations; fines and penalties

Sec. 23. (1) Except as provided in subsections (2) and (3), a person who violates this act shall be subject to a fine of up to $100.00 a day.

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[1]Section 290.655(d).

(2) A member of the board who intentionally violates section 7(5) shall be subject to the penalties prescribed in Act No. 267 of the Public Acts of 1976, as amended.

(3) If the board arbitrarily and capriciously violates section 7(6), the board shall be subject to the penalties prescribed in Act. No. 442 of the Public Acts of 1976, as amended.

290.674. Venue of prosecution; enforcement

. Sec. 24. (1) Except as provided in subsections (2) and (3), prosecution for violation of this act may be instituted in any county in which any of the defendants reside, or in which the violation was committed, or in which any of the defendants have a principal place of business. State and county law enforcement officers shall enforce this act.

(2) A prosecution for a violation of section 7(5) shall be instituted in the manner provided for in Act No. 267 of the Public Acts of 1976, as amended.

(3) A prosecution for a violation of section 7(6) shall be instituted in the manner provided for in Act No. 442 of the Public Acts of 1976, as amended.

CHAPTER 56.—UNFAIR TRADE PRACTICES AFFECTING PRODUCERS OF AGRICULTURAL PRODUCTS

Sec.

2301. Congressional findings and declaration of policy.

2302. Definitions.

2303. Prohibited practices.

2304. Disclaimer of intention to prohibit normal dealing.

2305. Enforcement provisions.

(a) Civil actions by persons aggrieved; preventive relief; attorneys' fees; security.

(b) Civil actions by Attorney General; federal jurisdiction; complaint; preventive relief.

(c) Suits by persons injured; federal jurisdiction; amount of recovery; attorneys' fees; limitation of actions.

(d) Federal jurisdiction; exhaustion of other remedies; State laws and jurisdiction unaffected.

2306. Separability of provisions.

§ 2301. Congressional findings and declaration of policy

Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to

the general economy of the Nation. Because agricultural products are produced by numerous individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

It is therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products.

Pub.L. 90-288, § 2, Apr. 16, 1968, 82 Stat. 93.

§ 2302. Definitions

When used in this chapter--

(a) The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent

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Historical Note

Short Title. Section 1 of Pub.L. 90-288 provided: "That this Act [which enacted this chapter] shall be known as the 'Agricultural Fair Practices Act of 1967'."

Legislative History. For legislative history and purpose of Pub.L. 90-288, see 1968 U.S.Code Cong. and Adm.News, p. 1867.

or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

(b) The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

(c) The term "association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title.

(d) The term "person" includes individuals, partnerships, corporations, and associations.

(e) The term "agricultural products" shall not include cotton or tobacco or their products.

Pub.L. 90-288, § 3, Apr. 16, 1968, 82 Stat. 94.

§ 2303. Prohibited practices

It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural prod-

ucts because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.

Pub.L. 90-288, § 4, Apr. 16, 1968, 82 Stat. 94.

* * *

§ 2304. Disclaimer of intention to prohibit normal dealing

Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

Pub.L. 90-288, § 5, Apr. 16, 1968, 82 Stat. 95.

§ 2305. Enforcement provisions—Civil actions by persons aggrieved; preventive relief; attorneys' fees; security

(a) Whenever any handler has engaged or there are reasonable grounds to believe that any handler is about to engage in any act or practice prohibited by section 2303 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. The court may provide that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Civil actions by Attorney General; federal jurisdiction; complaint; preventive relief

(b) Whenever the Secretary of Agriculture has reasonable cause to believe that any handler, or group of handlers, has engaged in any act or practice prohibited by section 2303 of this title, he may request the Attorney General to bring civil action in his behalf in the appropriate district court of the United States by filing with it a complaint (1) setting forth facts pertaining to such act or practice, and (2) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the handler, or handlers, responsible for such acts or practices.

Upon receipt of such request, the Attorney General is authorized to file such complaint.

Suits by persons injured; federal jurisdiction; amount of recovery; attorneys' fees; limitation of actions

(c) Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, any provision of section 2303 of this title may sue therefor in the appropriate district court of the United States without respect to the amount in controversy, and shall recover damages sustained. In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs. Any action to enforce any cause of action under this subsection shall be forever barred unless commenced within two years after the cause of action accrued.

Federal jurisdiction; exhaustion of other remedies; State laws and jurisdiction unaffected

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction.

Pub.L. 90-288, § 6, Apr. 16, 1968, 82 Stat. 95.

§ 2306. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby.

Pub.L. 90-288, § 7, Apr. 16, 1968, 82 Stat. 95.

No. 86-1246

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

OLD ORCHARD BRANDS, INC., and
R.V. SAUR AND SONS ORCHARDS, INC.,

Petitioner,

v

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE, and 63rd JUDICIAL DISTRICT COURT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WAS THE MICHIGAN AGRICULTURAL COMMODITIES MARKETING ACT AN "EXISTING STATE LAW" WHEN THE AGRICULTURAL FAIR PRACTICES ACT WAS ENACTED, AND THUS EXEMPT FROM PREEMPTION BY 7 USC 2305(d)?

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No. 86-1246

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

OLD ORCHARD BRANDS, INC., and
R.V. SAUR AND SONS ORCHARDS, INC.,

Petitioner,

v

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE, and 63rd JUDICIAL DISTRICT COURT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

JURISDICTION

Respondents do not deny that this Court has jurisdiction under 28 USC § 1257(3). Because the Michigan Supreme Court denied discretionary review, however, it is the judgment of the Michigan Court of Appeals which is reviewable and not the Order of the Michigan Supreme Court as indicated on the Petition.

STATEMENT OF THE CASE

Petitioners are an apple grower and processor of apple products who must pay mandatory assessments to the Michigan Apple Committee, a commodity promotion group organized under authority of the Agricultural

Commodities Marketing Act, MCL 290.651 *et seq;* MSA 12.94(21) *et seq* ["Michigan Act"], to sponsor generic advertising, research and promotion for Michigan apples.

Petitioners sought a declaratory judgment against the Michigan Act in state court, arguing that mandatory crop assessments are preempted by the federal Agricultural Fair Practices Act ["AFPA"], 7 USC 2301 *et seq.*

The trial court ruled in Petitioners' favor, finding that the Michigan Apple Committee is a producers' association subject to AFPA prohibitions to the extent that growers may decide whether to participate in a state's promotional program.

The Michigan Court of Appeals reversed, finding no preemption, because the Michigan Act was exempt from AFPA as an "existing state law", 7 USC 2305(d). The Michigan Act took effect on March 31, 1966, whereas AFPA was enacted by Pub L 90-288 on April 16, 1968. *Old Orchard Brands, Inc* v *Dept of Agriculture*, 152 Mich App 274 (1986).

The Michigan Supreme Court denied leave to appeal, 426 Mich 872 (1986).

ARGUMENT

A. 7 USC 2305(d) WAS ENACTED SO THAT NO EXISTING STATE LAW WOULD BE SUPERSEDED OR PREEMPTED BY AFPA.

The Michigan Agricultural Commodities Marketing Act, MCL 290.651 *et seq;* MSA 12.94(21) *et seq*, enacted in 1965 and taking effect March 31, 1966, authorizes Michigan producers of agricultural commodities to adopt promotional programs, funded by producer assessments, to

stimulate increased consumption of the particular food product through advertising, research, market development and information. Under this law, commodity programs have been established for: apples, asparagus, cherries, dairy products, onions, plums, soybeans and veal. The purpose of these programs is to enhance the economic position of the farmers through expanded markets.

Similar promotional commodity boards funded by producer assessments have been established in most agricultural states. Harl, 12 Agricultural Law § 113.04 (1983).

The Agricultural Fair Practices Act of 1967, Pub. L. 90-288, 82 Stat 93, 7 USC 2301 *et seq*, was signed into law on April 16, 1968. This Court has found that AFPA:

> "... protects the right of farmers and other producers of agricultural comodities to join cooperative associations through which to market their products ... Although the Act's principal purpose is to protect individual producers from interference by processors when deciding whether to belong to a producers' association, the Act also protects the producer from coercion by associations of producers. The AFPA thus provides that it is unlawful for either a processor or a producers' association to engage in practices that interfere with a producer's freedom to choose whether to bring his products to market himself or to sell them through a producers' cooperative association."[1]

From this Court's declaration of AFPA's purpose, Respondents are unaffected by AFPA because they are neither a cooperative association nor a producers' association as defined, and their advertising, promotional public-

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[1]

Michigan Canners & Freezers Assoc v Agricultural Marketing & Bargaining Bd, 467 US 461, 464, 104 S Ct 2518, 81 L Ed 2d 399 (1984).

ity and research activities clearly do not impinge upon or "interfere with a producer's freedom to choose" how products are brought to market, or the price received. Respondents do not engage in exclusive bargaining over marketing contracts, so are not subject to the prohbitions AFPA addresses.

AFPA contains a noteworthy exception for "existing state law", which is dispositive of this case. 7 USC 2305(d) provides in pertinent part:

> "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

This Court addressed this language in its *Michigan Canners and Freezers* decision, 467 US at 469:

> "The AFPA contains no pre-emptive language; nor does it reflect a congressional intent to occupy the entire field of agricultural-product marketing. Indeed, the Act states that it 'shall not be construed to change or modify existing State law.' 7 USC § 2305(d)."

In determining the scope of a statute, this Court looks first to its language. If the statutory language is unambiguous, in the absence of clearly expressed legislative intent to the contrary, that language is ordinarily regarded as conclusive. *United States* v *Turkette*, 452 US 576, 580, 101 S Ct 2524, 69 L Ed 2d 246 (1981).

This court will examine legislative intent as an aid to statutory construction. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the committee reports on the bill." *Garcia* v *United States*, 469 US 70, 76, 105 S Ct 479, 83 L Ed 2d 472 (1984).

The "existing state law" exemption in AFPA was not part of the original bill, but added by amendment. The House Committee on Argiculture explained its amendatory action:

> "This amendment was adopted to clarify the committee's intent that no State law should be superseded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies." H.R. Rep 824, 90th Cong, 1st Sess 4 (1967).

The House Committee's wording expanded upon the much narrower substitute amendment to S 109 that had passed the Senate, and which had provided in Section 6(e): "The foregoing provisions shall not be construed to deprive proper state courts of jurisdiction." S 109, 90th Cong, 1st Sess. Thus, it is clear that Congress not only wanted to preserve existing state law but also sought to maintian a favorable climate for state regulation in the future.

In conclusion, 7 USC 2305(d) provides that existing state law is not preempted. The Michigan Act was enacted in 1965, three years prior to passage of AFPA. Accordingly, the Michigan Act is preserved by 7 USC 2305(d).

B. SIMILAR NON-PREEMPTIVE LANGUAGE IS COMMON TO FEDERAL LAW.

The language exempting state law from federal preemption is not unique to AFPA. Similar provisions are found in many federal acts. For brevity, Respondents urge the Court's consideration of:

Civil Obedience Act of 1968, 18 USC 233
Consumer Credit Protection Act, 15 USC 1610(b)
Extortionate Credit Transactions Act, 18 USC 896
Fair Housing Act, 42 USC 3615
Mine Safety and Health Act, 30 USC 955 [12]

For example, in enacting the Federal Truth in Lending Act, Congress has deferred to state regulation of consumer credit rates. *Aldens, Inc* v *Ryan*, 454 F Supp 465, 476 (WD OK, 1976), struck down a challenge to Oklahoma interest rates by a national retailer:

> "Moreover, Congressional deference to State interest regulation as expressed by 15 USC § 1610(b) must again be considered. Congress has paramount authority to regulate commerce between the states. It has deferred to State regulation of interest rates."

Accordingly, the exemption afforded state law in AFPA is consistent with Congressional action in other laws.

The major thrust of Petitioners' argument is that 7 USC 2305(d) was meant only to preserve state statutory provisions consistent with AFPA. Respondents reply that neither the language nor the legislative history of the amendment that became 7 USC 2305(d) contain any such limitation.

Moreover, when Congress has intended such a result, the language of the preservation clause so indicates. For example, the same 90th Congress passed the Civil Obedience Act of 1968 and the Fair Housing Act, both with

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[12] Text of these statutes is set forth in the Appendix.

non-preemptive sections.[3] Each is worded so as to express specific Congressional intent that state law on the same subject matter is preserved providing it is consistent with the federal act.

If Congress had intended the same result in AFPA, then the language of 7 USC 2305(d) would so indicate. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent. *Andrus* v *Glover Construction Co*, 446 US 608, 616-617, 100 S Ct 1905, 64 L Ed 2d 548 (1980).

From the language and legislative history of 7 USC 2305(d), it is obvious that Congress intended to exempt all existing state law from the scope of AFPA.

C. RESPONDENTS' COMMODITY PROMOTION ACTIVITIES ARE SIMILAR TO THOSE AUTHORIZED BY THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Petitioners erroneously characterize Respondents' promotional activities as analogous to the exclusive agency bargaining over marketing contracts struck down in *Michigan Canners & Freezers, supra*. More appropriately, Respondents' activities bear closer resemblance to the promotional features of federal marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 USC 601 *et seq*.[4] That act authorizes federal marketing agreements and marketing orders to maintain orderly marketing conditions in interstate commerce for agricultural commodities.

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[3] 12 USC 233 and 42 USC 3615.

[4] Most federal marketing orders are set forth in 7 CFR.

Federal marketing orders may require mandatory payment of assessments to pay for expenditures to support advertising, research and market development. 7 USC 608c(6)(I). State programs have been specifically exempted by the following language from 7 USC 608c(6)(I):

> "Provided further, that the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity."

Respondents contend that the existence of federal agricultural marketing orders, with many featuring mandatory assessments partially used to finance advertising, market development and research, and many dating from before passage of AFPA, demonstrate a Congressional awareness of these programs with no express intent that AFPA invalidate this long history of federal involvement in agriculture.

The inclusion of the specific non-preemption language in 7 USC 608c(6)(I) further demonstrates Congress' intent to leave the states free to provide for their own agricultural promotion, such as the Michigan Act under scrutiny here. It is clear that the non-preemption clause in AFPA, 7 USC 2305(d), is consistent with the similar provision in the Agricultural Marketing Agreement Act of 1937.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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A. Civil Obedience Act of 1968, 12 USC § 233

Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof.

B. Consumer Credit Protection Act, 15 USC § 1610(b)

This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

C. Extortionate Credit Transactions, 18 USC § 896

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

D. Fair Housing Act, 42 USC § 3615.

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extend be invalid.

E. Mine Safety and Health Act, 30 USC § 955.

(a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect on December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard shall not be held to be in conflict with this chapter.